



**Dock Workers Union & another v Portside Freight Terminals Limited &
10 others (Petition (Application) E010 of 2024 & Petition E011 of 2024
(Consolidated)) [2024] KESC 66 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KESC 66 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) E010 OF 2024 & PETITION E011 OF 2024 (CONSOLIDATED)
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ
NOVEMBER 8, 2024**

BETWEEN

DOCK WORKERS UNION 1ST APPELLANT

OKIYA OMTATAH OKOITI 2ND APPELLANT

AND

PORTSIDE FREIGHT TERMINALS LIMITED 1ST RESPONDENT

PORTSIDE CFS LIMITED 2ND RESPONDENT

HEARTLAND TERMINALS LIMITED 3RD RESPONDENT

KENYA PORTS AUTHORITY 4TH RESPONDENT

**CABINET SECRETARY FOR NATIONAL TREASURY & ECONOMIC
PLANNING 5TH RESPONDENT**

KILINDINI TERMINALS LIMITED 6TH RESPONDENT

MOMBASA GRAIN TERMINAL LIMITED 7TH RESPONDENT

KAPA OIL REFINERY 8TH RESPONDENT

AFRICA PORTS & TERMINALS 9TH RESPONDENT

MULTISHIP INTERNATIONAL 10TH RESPONDENT

KATIBA INSTITUTE 11TH RESPONDENT

(Being an application for the withdrawal of SC Petition No. E010 of 2024)



Parties may withdraw proceedings at any time with leave from the Supreme Court.

The Supreme Court allowed the Dock Workers Union to withdraw its petition challenging a grain handling project at the Port of Mombasa, citing benefits for members. Allegations of improper motives were noted but did not bar withdrawal.

Reported by John Ribia

Civil Practice and Procedure – withdrawal of suit – withdrawal of proceedings before the Supreme Court - whether the Supreme Court had the power to deny a party that sought to withdraw proceedings before it - of the Supreme Court Rules (Cap 7B) (2020) rule 27(1)

Brief facts

The Dock Workers Union, the 1st appellant in SC Petition No. E010 of 2024, filed a petition challenging the development of a second grain handling facility at the Port of Mombasa. Later, the Union sought to withdraw the petition, arguing that the project would create jobs, increase revenue for the Kenya Ports Authority, and lower grain prices. The Union claimed its Executive Committee had not authorized its joinder in earlier proceedings or the filing of the petition. The 2nd appellant, opposed the withdrawal, alleging improper motives and perjury by the Union's Secretary General. Despite these allegations, the respondents in the petition did not file any responses or objections to the application.

Issues

Whether the Supreme Court had the power to deny a party that sought to withdraw proceedings before it.

Held

1. Through the provisions of rule 27(1) of the Supreme Court Rules, 2020, a party could with leave of the Supreme Court, withdraw the proceedings at any time before the delivery of judgment. A party's right to withdraw its case from court could not be denied, and the court could not prohibit a party from doing so.
2. Since the Union had expressed its desire to withdraw its petition, and despite the 2nd appellant's arguments and concerns, the Supreme Court allowed the Union's Motion for leave to withdraw SC Petition No. E010 of 2024. The withdrawal effectively left SC Petition No. E011 of 2024 [*Okiya Omtatah Okoiti vs. Portside Freight Terminals Limited & 10 Others*] as the only petition of appeal in the matter.
3. An award of costs was an exercise of discretion. Costs follow the event. The 2nd appellant, in his replying affidavit, had not sought for costs of this application. The appeal was being withdrawn before the respondents had filed any responses or substantive submissions to the consolidated appeal. There would be no prejudice to any of the parties.

Petition withdrawn, no order as to costs.

Citations

Cases

Kenya

1. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR) - (Applied)
2. *Salat v Independent Electoral and Boundaries Commission & 7 others* Application 16 of 2014; [2014] KESC 12 (KLR) - (Applied)

Statutes

Kenya

1. Supreme Court (General) Practice Directions, 2020 (cap 9B Sub Leg) regulation 48- (Interpreted)
2. Supreme Court Rules, 2020 (Repealed) (cap 9B Sub Leg) rule 27(1) - (Interpreted)



Advocates

None mentioned

RULING

1. Upon reading the applicant's (Union) notice of motion dated August 14, 2024, expressed to be brought under rule 27 of the *Supreme Court Rules, 2020* and Practice Direction No 48 of the *Supreme Court (General) Practice Directions, 2020* for orders, that:
 - a. The Petition No E010 of 2024 filed by the Dock Workers Union against Portside Freight Terminal Limited & 10 others as respondents, be withdrawn;
 - b. In the alternative, leave be granted to the Dock Workers Union, the 1st appellant, to cease participating as a petitioner and its further participation in the matter be dispensed with; and
 - c. The costs of this application and Petition No E010 of 2024 sought to be in the discretion of the court (sic); and
2. Upon considering the supporting affidavit sworn by the Union's Secretary General, Simon Sang, on August 14, 2024 together with its written submissions of even date to the effect that: in addition to the construction and development of a grain handling facility and island berth at G- Section Area Kenya Port Authority, Portside Companies (1st, 2nd and 3rd respondents) had agreed to develop an offshore berth, which will be a common user berth, at the port of Mombasa which will result in additional cargo traffic; it has now become apparent to the Union that more job opportunities will be created at the Port of Mombasa for its members and the wider public, besides generating additional revenue for Kenya Ports Authority (KPA) and the likely decrease in grain and food prices by reason of competition that will result from the introduction of a second player in the sector; and
3. Considering further, that before the High Court, the Union was an interested party whereas the dispute essentially involved private interests, which do not concern the Union in any real sense; that neither the Executive Committee nor the membership of the Union were aware that the applicant had been joined in the High Court or Court of Appeal and such joinder had not been authorized; equally, neither the Executive Committee nor the membership of the Union has permitted the filing of the instant petition before this court. In any event, KPA which is a material stakeholder, seems to support the development of a second bulk grain handling facility as it has not participated in these proceedings. Consequently, the Executive Committee of the Union has therefore resolved to withdraw this petition as there is no plausible reason for the Union to proceed with this matter in view of the aforementioned benefits to both its members and the wider public; and
4. Noting that the 2nd appellant in a replying affidavit sworn by Okiya Omtatah Okoiti on September 5, 2024 has opposed this motion on the grounds that: the Union has not demonstrated that it would be detrimental to the interests of the dock workers and the public interest if the project in issue was to be established either at Lamu or Dongo Kundu in compliance with KPA's masterplan; that the Union's Secretary General who is the deponent of the affidavits by the Union, was aware of the proceedings and actively participated in them; that although the 2nd appellant has no objection to the petition being withdrawn as prayed, he reasonably suspects that the same is being withdrawn for improper motives and to advance corrupt practices. What is more, he alleges perjury on the part of, Mr. Simon Sang, the Union's Secretary General by his affidavits before this court; and



5. Cognizant that none of the respondents have filed any pleadings in response to or in opposition to this motion; and
6. Having considered the application, affidavits and rival arguments, We now opine as follows:
 - i. By the provisions of rule 27(1) of the Supreme Court Rules, 2020, “A party may with leave of the court, withdraw the proceedings at any time before the delivery of judgment.”
 - ii. We are alive to the fact that a party’s right to withdraw its case from court cannot be denied, and the court cannot prohibit a party from doing so. This court observed as much in Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR), where it held:

“ A party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”
 - iii. Bearing this in mind, since the Union has expressed its desire to withdraw its petition, and despite the 2nd appellant’s arguments and concerns, we hereby allow the Union’s motion for leave to withdraw SC Petition No E010 of 2024. This withdrawal effectively now leaves SC Petition No E011 of 2024 *Okiya Omtatah Okioti v Portside Freight Terminals Limited & 10 others* as the only petition of appeal in the matter.
 - iv. On costs, we underscore the fact that an award of costs is an exercise of discretion and follows the principle set out by this court in Rai & 3 others v Rai, Estate of & 4 others, [2014] KESC 31 (KLR) that costs follow the event. In applying this principle, we note that the 2nd appellant, in his replying affidavit, has not sought for costs of this application. Moreover, we note from the record, that the appeal is being withdrawn before the respondents had filed any responses or substantive submissions to the consolidated appeal. There will be no prejudice to any of the parties. In view of the foregoing and in the exercise of our discretion, we make no orders as to costs.
7. Consequently, and for the reasons aforesaid, we make the following Orders:
 - i. The applicant’s notice of motion dated August 14, 2024 be and is hereby allowed;
 - ii. SC Petition No E010 of 2024 dated March 21, 2024 and filed on April 4, 2024, be and is hereby marked as withdrawn, leaving SC Petition No E011 of 2024 *Okiya Omtatah Okioti v Portside Freight Terminals Limited & 10 others* as the only petition of appeal; and
 - iii. There shall be no orders as to costs.

It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

.....
P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT OF KENYA

.....
M. K. IBRAHIM



JUSTICE OF THE SUPREME COURT

.....

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

